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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Lisa Ann York Spann,

No. CV-20-00534-PHX-SMB

10 Plaintiff,

ORDER

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

15 At issue is the denial of Plaintiff Lisa Ann York Spann's Application for Social
16 Security Disability Insurance ("SSDI") benefits by the Social Security Administration
17 ("SSA") under the Social Security Act (the "Act"). Plaintiff filed a Complaint, (Doc. 1),
18 and an Opening Brief, (Doc. 18), seeking judicial review of that denial. Defendant SSA
19 filed an Answering Brief, (Doc. 19), to which Plaintiff replied, (Doc. 22). The Court has
20 reviewed the parties' briefs, the Administrative Record ("AR"), (Docs. 13, 13-1-13-15),
21 and the Administrative Law Judge's ("ALJ's") decision, (AR at 14-31), and will vacate
22 the ALJ's decision remand for further proceedings for the reasons addressed herein.

23 **I. BACKGROUND**

24 Plaintiff filed an Application for SSDI benefits in March of 2015, alleging a
25 disability beginning in September of 2014. (AR at 17.) Plaintiff's claim was initially
26 denied in June of 2016, (*Id.*), and again on reconsideration in October 2016, (*Id.*). A
27 hearing was held before ALJ Bucci on July 2, 2018. (*Id.*) After considering the medical
28 evidence and opinions, the ALJ determined that Plaintiff suffered from severe impairments,

1 including morbid obesity, lumbar degenerative disc disease status post fusion, knee
 2 disorder, cervical degenerative disc disease, fibromyalgia, and hand arthritis. (AR at 21.)
 3 However, the ALJ concluded that, despite these impairments, Plaintiff had the residual
 4 functional capacity (“RFC”) to perform light work as defined in 20 CFR § 404.1567(b).
 5 (AR at 24.) Consequently, Plaintiff’s Application was again denied by the ALJ on October
 6 31, 2018. (AR at 31.) Thereafter, on January 18, 2020, the Appeals Council denied
 7 Plaintiff’s Request for Review of the ALJ’s decision—making it the final decision of the
 8 SSA Commissioner (the “Commissioner”—and this appeal followed. (Doc. 18.)

9 **II. LEGAL STANDARDS**

10 An ALJ’s factual findings “shall be conclusive if supported by substantial
 11 evidence.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1153 (2019). The Court may set aside
 12 the Commissioner’s disability determination only if it is not supported by substantial
 13 evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007).
 14 Substantial evidence is relevant evidence that a reasonable person might accept as adequate
 15 to support a conclusion considering the record as a whole. *Id.* Generally, “[w]here the
 16 evidence is susceptible to more than one rational interpretation, one of which supports the
 17 ALJ’s decision, the ALJ’s conclusion must be upheld.” *Thomas v. Barnhart*, 278 F.3d 947,
 18 954 (9th Cir. 2002). In determining whether to reverse an ALJ’s decision, the district court
 19 reviews only those issues raised by the party challenging the decision. *See Lewis v. Apfel*,
 20 236 F.3d 503, 517 n.13 (9th Cir. 2001).

21 **III. DISCUSSION**

22 Plaintiff argues that the ALJ committed harmful error by failing to properly weigh
 23 Plaintiff’s symptom testimony and by improperly weighing the treating medical source
 24 opinion evidence. (Doc. 18 at 6–20.) The Commissioner argues that the ALJ’s opinion is
 25 supported by substantial evidence and is free of legal error. (Doc. 19.) The Court has
 26 reviewed the medical and administrative records and agrees with the Plaintiff for the
 27 following reasons.

28 **A. Plaintiff’s Symptom Testimony**

1 An ALJ performs a two-step analysis to evaluate a claimant's testimony regarding
 2 pain and symptoms. *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014). First, the
 3 ALJ evaluates whether the claimant has presented objective medical evidence of an
 4 impairment that "could reasonably be expected to produce the pain or symptoms alleged."
 5 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035–36 (9th Cir. 2007) (quoting *Bunnell v.*
 6 *Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)) (internal quotation marks omitted). Second,
 7 absent evidence of malingering, an ALJ may only discount a claimant's allegations for
 8 reasons that are "specific, clear and convincing" and supported by substantial evidence.
 9 *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012).

10 "[T]he ALJ must specifically identify the testimony she or he finds not to be credible
 11 and must explain what evidence undermines the testimony." *Holohan v. Massanari*, 246
 12 F.3d 1195, 1208 (9th Cir. 2001). General findings are insufficient. *Id.* "Although the
 13 ALJ's analysis need not be extensive, the ALJ must provide some reasoning in order for
 14 [the Court] to meaningfully determine whether the ALJ's conclusions were supported by
 15 substantial evidence." *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th
 16 Cir. 2014). "[T]he ALJ may consider inconsistencies either in the claimant's testimony or
 17 between the testimony and the claimant's conduct." *Molina*, 674 F.3d at 1112. For
 18 instance, the ALJ may consider "whether the claimant engages in daily activities
 19 inconsistent with the alleged symptoms." *Id.* (quoting *Lingenfelter*, 504 F.3d at 1040).

20 Plaintiff argues that although the ALJ sets out some rationales for discounting her
 21 testimony, "[t]hese rationales are not clear and convincing, specific and legitimate, and are
 22 not based on citation to substantial evidence." (Doc. 18 at 6–7.) Plaintiff alleges that the
 23 ALJ decision is patterned upon citations that emphasize normal findings to discount
 24 Plaintiff's testimony but ignore the portions of the very treatment notes cited that are
 25 consistent with her testimony. (*Id.* at 9.) Plaintiff contends that although the ALJ
 26 summarizes the medical evidence of record, she does not actually explain how the evidence
 27 is inconsistent with Plaintiff's testimony. (*Id.* at 10.) Plaintiff also contends that it was
 28 error for the ALJ to cite Plaintiff's three separate attempts to work to suggest that her

1 impairments may not be as limiting as alleged. (*Id.* at 14.)

2 The Commissioner argues that the medical record failed to corroborate Plaintiff's
3 allegations of disability during the relevant period, (Doc. 19 at 5), and that “[i]nconsistency
4 with ‘the medical record is a sufficient basis for rejecting the claimant’s subjective
5 testimony.”’ (*Id.* at 5–6 (quoting *Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155,
6 1161 (9th Cir. 2008))). The Commissioner contends that Plaintiff's ability to work at near
7 substantial gainful activity levels during the relevant period “plainly suggests that her
8 impairments may not have been as limiting as alleged.” (*Id.* at 8.) The Commissioner also
9 argues that the ALJ properly weighed medical evidence when citing to portions of the
10 record that did not support Plaintiff's symptom testimony. (*Id.* at 9.)

11 Here, the ALJ failed to provide clear and convincing, specific, and legitimate
12 reasons for discounting Plaintiff's testimony. Specifically, the ALJ appears to have cherry-
13 picked snippets in the record to discredit Plaintiff's testimony without considering
14 evidence, in the same notes, that supports her testimony. The ALJ also failed to adequately
15 explain how the evidence is inconsistent with Plaintiff's testimony. The ALJ stated that
16 “[w]hile the claimant’s surgical history gives a plausible explanation for her pain and
17 limitations, the clinical evidence and treatment record suggest her complaints of
18 debilitating pain were not supported fully prior to the date last insured.” (AR at 26.)
19 However, the ALJ produced little evidence to discredit her testimony. For example, in the
20 ALJ's order she cites to medical records for the proposition that—while the Plaintiff
21 periodically reported pain after surgery—Plaintiff also stated that she was feeling better.
22 (See *id.*) However, the physical therapy notes cited by the ALJ show that just ten days
23 later Plaintiff reported pain in her back that was six out of ten in intensity after taking pain
24 medication. (AR at 447.) The ALJ's opinion noted that “claimant was noted as ambulating
25 independently and appeared to have no significant difficulty transitioning from sitting to
26 standing or walking from the waiting room to the evaluation room.” (AR at 26.) However,
27 simply because Plaintiff did not appear to have trouble walking from a waiting room to an
28 evaluation room does not mean that she did not experience chronic pain or that the pain

1 did not affect her daily living and ability to work. *See Corless v. Comm'r of Soc. Sec.*
 2 *Admin.*, 260 F. Supp. 3d 1172, 1179 (D. Ariz. 2017) (“A person may be disabled without
 3 constantly appearing unhealthy or in acute distress.”). Finally, the ALJ noted in the opinion
 4 that “while some physical examinations revealed tenderness to palpation of the lumbar
 5 spine, a more recent examination in November 2017 revealed only tenderness at the site of
 6 a rash on her back.” (*Id.*) However, the same note explained that her back pain was
 7 actually getting worse. (AR at 1050.) These are all examples of how the ALJ failed to
 8 provide clear and convincing, specific, and legitimate reasons for discounting Plaintiff’s
 9 testimony regarding her chronic back pain.

10 Furthermore, the ALJ concluded that Plaintiff’s work attempts suggested that her
 11 impairments may not have been as limiting as alleged. (AR at 28.) Plaintiff had three
 12 separate work attempts in call centers during the relevant period of alleged disability. (AR
 13 at 43.) In one case, she was unable to maintain employment for even a week due to the
 14 severity of her symptoms and absenteeism. (*Id.*) In another case, she quit in lieu of being
 15 fired within three months of starting work due to absenteeism. (*Id.*) Her other work attempt
 16 ended with her termination before the end of her probationary period due to absenteeism.
 17 (*Id.*) The Ninth Circuit has determined that the fact that a plaintiff has worked for a brief
 18 period of time, alone, is not a clear and convincing reason for rejecting subjective pain and
 19 symptom testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038 (9th Cir. 2007) (“Indeed,
 20 we have suggested that similar evidence that a claimant tried to work and failed actually
 21 supported his allegation of disabling pain.” (emphasis original)). Here, too, the fact that
 22 Plaintiff tried, but failed, to work actually supports—rather than discredits—her pain and
 23 symptom testimony. Thus, it was not a clear and convincing, specific and legitimate reason
 24 for rejecting her testimony.

25 Therefore, the Court finds that the ALJ erred by failing to provide clear and
 26 convincing, specific, and legitimate reasons for discounting Plaintiff’s subject pain and
 27 symptom testimony.

28 **B. Evaluation of Medical Testimony**

1 **1. Nurse Practitioner Young**

2 While “[t]he ALJ must consider all medical opinion evidence,” there is a hierarchy
 3 among the sources of medical opinions. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th
 4 Cir. 2008). Those who have treated a claimant are treating physicians; those who examined
 5 but did not treat the claimant are examining physicians; and those who neither examined,
 6 nor treated the claimant are non-examining physicians. *Lester v. Chater*, 81 F.3d 821, 830
 7 (9th Cir. 1995). “As a general rule, more weight should be given to the opinion of a treating
 8 source than to the opinion of doctors who did not treat the claimant.” *Id.* This is so because
 9 treating physicians have the advantage of in-person interaction and typically a longer
 10 history of treatment than a claimant’s other doctors, and their “subjective
 11 judgments . . . are important, and properly play a part in their medical evaluations.”
 12 *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988).

13 An ALJ “may only reject a treating or examining physician’s uncontradicted
 14 medical opinion based on ‘clear and convincing reasons.’” *Carmickle*, 533 F.3d at 1164
 15 (quoting *Lester*, 81 F.3d at 830–31). “Where such an opinion is contradicted, however, it
 16 may be rejected for specific and legitimate reasons that are supported by substantial
 17 evidence in the record.” *Id.* An ALJ meets this standard by “setting out a detailed and
 18 thorough summary of the facts and conflicting medical evidence, stating his interpretation
 19 thereof, and making findings.” *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

20 Plaintiff argues the ALJ erred by improperly weighing the opinion of Nurse
 21 Practitioner (“NP”) Jennifer Young. (Doc. 18 at 16.) Plaintiff also argues that the only
 22 other rationale that the ALJ gave for giving little weight to NP Young’s statement, that her
 23 assertion is an opinion reserved for the Commissioner, was improper because NP Young’s
 24 statement included comments on Plaintiff’s medical condition and diagnoses in addition to
 25 the opinion. The Commissioner argues that NP Young’s statement was one reserved to the
 26 Commissioner because it was an opinion about whether she could work. (Doc. 19 at 11.)

27 Here, the ALJ gave “little weight” to the opinion of NP Young. (AR at 28.) The
 28 ALJ wrote:

Because this opinion is not from an acceptable medical source, I give it less weight than other qualifying medical source opinions (20 CFR 404.1513(a)(e)). Additionally, to the extent that Ms. Young's opinion relates to the claimant's ability to work, As [sic] an opinion on an issue reserved to the Commissioner, this statement is not entitled to controlling weight and is not given special significance pursuant to 20 CFR 404.1527(d).

(*Id.*) The Court has reviewed the letter authored by NP Young that Plaintiff claims the ALJ improperly rejected. That letter contains very little substance. (*See AR at 609.*) It simply states that Plaintiff's chronic pain is preventing her from engaging in activities of daily living and from working. (*Id.*) The letter then lists her medical conditions. (*Id.*)

The ALJ properly rejected NP Young's letter. Her letter constitutes nothing more than an opinion about whether Plaintiff could work. It contains little substance besides listing her conditions. NP Young gave no reasons for her conclusion. Accordingly, the ALJ properly rejected the letter on the grounds that it was a statement regarding NP Young's opinion about whether Plaintiff could work. Moreover, even if this was not the case, Social Security regulations in force at the time of the ALJ decision undisputedly set forth a lower standard for rejecting the opinion of "other" medical sources, including nurse practitioners. However, because the Court finds that the letter contains an opinion reserved for the Commissioner, the Court need not determine whether the ALJ improperly rejected her opinion.

2. State Agency and Non-Examining Physician

Lastly, Plaintiff argues that the ALJ erred by preventing Plaintiff from cross-examining the state agency examining and non-examining physicians whose opinions the ALJ gave substantial weight. (Doc. 18 at 18.) Plaintiff also argues that the ALJ erred by giving the opinions themselves substantial weight, as the rationales given for doing so were not based upon substantial evidence in the record. (*Id.*)

Plaintiff has failed to fully explain why the ALJ erred when it failed to allow Plaintiff to cross-examine the state agency physicians. The authority cited by Plaintiff does not support her argument that it was an error for the ALJ to fail to give Plaintiff an

1 opportunity to cross-examine these physicians.

2 As to Plaintiff's argument that the ALJ erred in giving the opinions themselves
3 substantial weight, Plaintiff gives scant reasoning to support this argument. As evidence
4 that the ALJ's decision to give substantial weight to these decisions was an error, Plaintiff
5 simply points out that examining physician Dr. Cunningham's decision was based, in part,
6 on the ALJ's conclusion that Plaintiff's treatment had been "conservative", labeling this
7 characterization as an obvious error. (Doc. 18 at 18–19.) The Court finds that the
8 Plaintiff's scant rationales are not enough to warrant a finding that the ALJ erred by giving
9 substantial weight to the opinions of the state agency physicians.

10 **IV. SUPPLEMENTAL BRIEFING**

11 Plaintiff filed an additional pleading informing the Court that on April 13, 2021, the
12 agency issued a decision finding Ms. Spann disabled as of November 1, 2018—just one
13 day after the ALJ's denial opinion which is now subject to this Court's review. (Doc. 23
14 at 1.) Plaintiff asks the court for a scheduling order if additional briefing is needed. The
15 Court finds that this fact is irrelevant to the current order and that additional briefing is not
16 necessary.

17 **V. HARMFUL ERROR**

18 The Court "will not reverse the decision of the ALJ for harmless error, which exists
19 when it is clear from the record that the ALJ's error was inconsequential to the ultimate
20 nondisability determination." *Tommasetti*, 533 F.3d at 1038.

21 Here, the ALJ's error in improperly rejecting Plaintiff's symptom testimony was
22 harmful. The rejection of her symptom testimony may have had an effect on the ALJ's
23 ultimate disability determination. Specifically, the ALJ found that Plaintiff suffered from
24 severe impairments including morbid obesity, lumbar degenerative disc disease status post
25 fusion, knee disorder, cervical degenerative disc disease, fibromyalgia, and hand arthritis.
26 (AR at 21.) The ALJ determined that "[w]hile the claimant's surgical history gives a
27 plausible explanation for her pain and limitations, the clinical evidence and treatment
28 records suggest her complaints of debilitating pain were not supported fully prior to the

1 date last insured.” (AR at 26.) However, the ALJ failed to give clear and convincing,
 2 specific, and legitimate reasons for discounting her testimony. Without such evidence, the
 3 ALJ’s decision is not supported by substantial evidence. Therefore, the Court will vacate
 4 the ALJ’s October 31, 2018 opinion and remand this case to the ALJ.

5 **VI. REMAND**

6 If the ALJ’s decision is not supported by substantial evidence or suffers from
 7 harmful legal error, the district court has discretion to reverse and remand either for an
 8 award of benefits or for further administrative proceedings. *Smolen v. Chater*, 80 F.3d
 9 1273, 1292 (9th Cir. 1996); *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987).
 10 “Remand for further proceedings is appropriate if enhancement of the record would be
 11 useful.” *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004). “Conversely, where the
 12 record has been developed fully and further administrative proceedings would serve no
 13 useful purpose, the district court should remand for an immediate award of benefits.” *Id.*
 14 (citing *Smolen*, 80 F.3d at 1292). Here, Plaintiff contends that the ALJ’s errors require this
 15 Court to remand her case for computation of benefits. (Doc. 18 at 19.) The Court
 16 disagrees.

17 Although the ordinary remedy for reversible error is to remand the case for further
 18 administrative proceedings, the credit-as-true rule may apply in rare circumstances where
 19 three conditions are present. *Garrison*, 759 F.3d at 1020. First, the record must be fully
 20 developed, and further administrative proceedings would not be useful to resolve
 21 ambiguities or conflicts. *Id.*; see *Treichler*, 775 F.3d 1090, 1101 (9th Cir. 2014). Second,
 22 the ALJ must have failed to give “legally sufficient reasons for rejecting evidence,”
 23 including subjective testimony and medical opinions. *Garrison*, 759 F.3d at 1020. Third,
 24 if the discounted or rejected evidence was credited as true, the ALJ would be required to
 25 find that the claimant is disabled. *Id.* Even if all three conditions of the credit-as-true rule
 26 are met, the Court may remand for further proceedings “when the record as a whole creates
 27
 28

1 serious doubt as to whether the claimant is, in fact, disabled within the meaning of the
2 Social Security Act.” *Id.* at 1021.¹

3 Here, further proceedings are appropriate. First, neither party is arguing that the
4 record is not fully developed. Second, the ALJ, indeed, failed to give legally sufficient
5 reasons for rejecting Plaintiff’s symptom testimony regarding her chronic back pain.
6 Third, if Plaintiff’s discounted testimony were to be credited as true, it is not entirely clear
7 whether the ALJ would be required to find that Plaintiff is disabled. The record contains
8 some conflicting evidence concerning whether Plaintiff could perform light work. This is
9 a situation where the record as a whole creates doubt as to where Plaintiff is, in fact,
10 disabled within the meaning of the Social Security Act. Thus, this is not the rare
11 circumstance where the credit-as-true rule mandates a remand for the computation of
12 benefits.

13 Therefore, after an analysis of the credit-as-true rule, the Court will remand this case
14 to the ALJ for further proceedings to determine whether Plaintiff is disabled.

15 **VII. CONCLUSION**

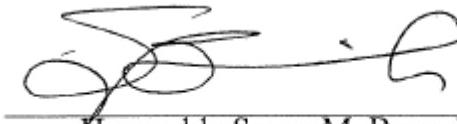
16 Therefore,

17 **IT IS ORDERED** vacating the October 31, 2018 decision of the ALJ, as upheld by
18 the Appeals Council.

19 **IT IS FURTHER ORDERED** remanding this case for further proceedings
20 consistent with this opinion.

21 **IT IS FURTHER ORDERED** instructing the Clerk to enter judgment consistent
22 with this order and terminate this case.

23 Dated this 17th day of August, 2022.

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26 
Honorable Susan M. Brnovich
United States District Judge

27
28 ¹ Although Plaintiff’s Opening Brief contains no analysis of the credit-as-true rule, the
Court will nonetheless examine the rule.